Legal Issues of Economic Integration 34(1): 27–52, 2007.

A 'Margin of Appreciation' in the Internal Market: Lessons from the European Court of Human Rights

*By James A. Sweeney**

Abstract

This article charts the interplay between universality and particularism in the approach of the European Court of Justice to national restrictions upon the four freedoms. Comparisons are made with the jurisprudence of the European Court of Human Rights. It is shown that both courts allow a national 'margin of appreciation' within which overlapping European and local public interests can be balanced. The article draws inspiration from research into the impact of the margin of appreciation upon the universality of human rights in order to understand the potential of the doctrine for the enlarged European Union. The doctrine is placed within a normative framework based upon the European Union as an 'essentially contested' project. The use of the doctrine by the European Court of Justice is analysed then in the light of this framework, with particular emphasis placed upon the existence of outer limits to the doctrine, and the factors that guide its width.

1. Introduction

The enlarged European Union presents a complex moral landscape in which the Union may struggle either to construct or to maintain its own culture and identity whilst respecting that of its Member States.[1] The question this article seeks to examine is how possible tensions between 'European' aims and Member States' moral and cultural values have been handled by the European Court of Justice when it examines limitations to the economic freedoms upon which the Community was founded.[2]

* Lecturer, Department of Law, Durham University (UK). Thank you to Ian Ward and Stephen Weatherill, who read and commented upon an earlier draft of this work. The usual disclaimer applies.

1. *See* I. Ward, 'The Culture of Enlargement' (2005) 12 *Columbia Journal of European Law* 199.
2. Similar issues have arisen in respect of state aids, but will not be discussed here; E. Psychogiopoulou, 'EC State Aid Control and Cultural Justifications' (2006) 33 *Legal Issues of Economic Integration* 3.

This article shows that the European Court of Justice has actually taken a rather similar approach to the European Court of Human Rights, by recognising a 'margin of appreciation' when morally and culturally sensitive matters are at issue.[3] Although the impact that morally sensitive matters may have upon the principle of proportionality is recognised in Community law,[4] the role and impact of the margin of appreciation itself is more nebulous. The jurisprudence of the European Court of Human Rights applying the margin of appreciation doctrine has been subject to considerable scrutiny from the perspective of tensions between universality and particularism, and so its examination holds valuable lessons in this regard for the European Court of Justice.[5]

The first purpose of this article is to establish that both courts, in fact, use the margin of appreciation doctrine. Part Two therefore introduces the jurisprudence of the European Court of Human Rights ('ECtHR') and then isolates commonalities within the jurisprudence of the Court of Justice ('ECJ'). Part Three sketches a normative framework within which the margin of appreciation doctrine can be situated, stressing its role in an 'essentially contested' European Union ('EU'). Part Four then examines the doctrine in operation against this framework. The doctrine is poised to play a very important role in the enlarged EU.

2. Identifying the 'Margin of Appreciation'

2.1. The International Character of the Margin of Appreciation

The question of establishing how deferential courts should be to executive and legislative bodies is a familiar one in many aspects of domestic public law. There are commonalities with the English law on *Wednesbury* unreasonableness and in the USA.[6] The doctrine has clear counterparts in many civil law

3. S. Hall, 'The European Convention on Human Rights and Public Policy Exceptions to the Free Movement of Workers Under the EEC Treaty', (1991) 16 *European Law Review* 466, 481; Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International law? (2005) 16 *European Journal of International Law* 907, 928.
4. *See* e.g. J. Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239, 245.
5. The comparisons made here between the jurisprudence of the European Court of Human Rights and the European Court of Justice are thus not on the substantive protection of human rights, but on what both courts' use of the margin of appreciation doctrine reveals about their approaches to universality and particularism; cf S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Aquis*' (2006) 43 *Common Market Law Review* 629.
6. *See* D. L. Donoho, 'Autonomy, Self-governance, and the Margin of Appreciation: Developing a

jurisdictions,[7] notably France and Germany.[8] Judicial deference, in these circumstances, is justified on democratic grounds, and reflects concerns about maintaining the separation of powers.

The focus of this article is upon cases that involve the review of Member States' conduct by the ECJ and ECtHR. The distinctive feature of the margin of appreciation doctrine analysed here is that, in addition to meeting the separation of powers concerns that affect all courts, there is the further issue of the relationship between national and international (or supranational) bodies.[9] Indeed, in the UK's domestic case law under the Human Rights Act 1998, it has been recognised that the margin of appreciation doctrine will play no role.[10] This reinforces the international character of the doctrine and thus, in its international incarnation, the doctrine raises normative questions about the relationship between national values and European or universal rights.

2.2. The ECHR and Local Values

Most standard texts on the European Convention on Human Rights ('ECHR') recognise that the margin of appreciation plays a role in a huge number of the

Jurisprudence of Diversity Within Universal Human Rights' (2001) 15 *Emory International Law Review* 391, 443 *et seq* for explicit comparisons between the European 'margin of appreciation' doctrine and the practice of the US Supreme Court; note also the federal courts' application of the 'political question doctrine', K. L. Boyd, 'Are Human Rights Political Questions?' (2001) 53 *Rutgers Law Review* 277.

7. Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Oxford, 2002), 3; H. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer, The Hague, 1996), 14.
8. Y. Arai-Takahashi, 'Discretion in German Administrative Law: Doctrinal Discourse Revisited' (2000) 6 *European Public Law* 69.
9. E. Brems, 'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights' (1996) 56 *Zeitschrift fur Auslandisches offenthiches recht und volkerrecht* 240, 293; Jans (note 4) 241–242; J. A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War era' (2005) 54 *International and Comparative Law Quarterly* 459, 472.
10. *R* v. *DPP Ex parte Kebilene* [2000] 2 AC 326, 380, per Lord Hope; *Brown* v. *Stott* [2003] 1 AC 681, 711, per Lord Steyn; *International Transport Roth GmbH* v. *Secretary of State for the Home Department* [2003] QB 728, 765, per Laws LJ; on the inapplicability of the margin of appreciation to national law *see* T. H. Jones, 'The devaluation of human rights under the European Convention' (1995) *Public Law* 430; R. Singh, 'Is There a Role for the "Margin of Appreciation" in National Law after the Human Rights Act' (1999) 1 *European Human Rights Law Review* 15; J. A. Sweeney, 'Domestic Judicial Deference and the ECHR in the UK and Netherlands' (2003) 11 *Tilburg Foreign Law Review* 439, 444.

ECtHR's cases.[11] It is a 'key concept'[12] in determining whether limitations upon human rights are necessary in a democratic society. Indeed, it is the sheer wealth of case law and commentary on the ECtHR's use of the margin of appreciation that promotes its study as being useful for analysing the ECJ's jurisprudence.

The use of the concept has arisen from cases concerning derogations in times of war of public emergency. However, it is the appearance of the margin in non-emergency cases that is the most relevant here.

The ECtHR usually adopts a three-stage process to examining limitations upon 'qualified' rights.[13] Firstly, it requires that a restriction to a Convention right is in accordance with or is prescribed by law.[14] Secondly, the purpose of the restriction must be within the remit of one of the 'legitimate aims' specified in the relevant article. Finally, the restriction must be necessary in a democratic society. However, the ECtHR has recognised that states enjoy a 'margin of appreciation' in assessing the necessity of their restriction to Convention rights.

Perhaps the most often cited reference to the margin of appreciation doctrine was made in the 1976 *Handyside* case, involving Article 10 ECHR on free expression. The case concerned restrictions on the publication of a schoolbook deemed obscene by the authorities in the United Kingdom. The ECtHR explained its position thus:

> '…[I]t is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place […]. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. [….] Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. […]'[15]

11. *See* e.g. M. Janis *et al*, *European Human Rights Law* (2nd Edn OUP, Oxford, 2000), 146 *et seq*; J. Rehman, *International Human Rights Law* (Pearson Harlow, 2003), 167; H. Steiner and P. Alston, *International Human Rights in Context* (2nd Edn OUP, Oxford, 2000), 854 *et seq*.
12. J. G. Merrills and A. H. Robertson, *Human Rights in Europe* (4th Edn Manchester University Press, Manchester, 2001).
13. C. Ovey and R. White, *Jacobs and White – European Convention on Human Rights* (OUP, Oxford, 2002), 201.
14. *Kruslin* v. *France* (1990) 12 EHRR 547, para. 27 contains a summary of the approach of Court of Human Rights to this aspect of the test. It was discussed in more detail in the earlier case of *Sunday Times* v. *UK* (1979–80) 2 EHRR 245, para. 47.
15. *Handyside* v. *UK* Series A No. 24 (1979–80) 1 EHRR 737 para. 48.

The ECtHR allowed the UK's restriction on the publication of the book, despite the fact that it had been published elsewhere in Europe. It seemed therefore that the limitations in the Convention might apply differently from state to state, because the requirement of morality do not have the same content in each Contracting Party.

This apparent deference to local values can be seen in a wide range of the ECtHR's judgments. The margin of appreciation thus plays an important role in mediating between universality and particularism in the Convention system. This aspect of the margin of appreciation doctrine's use has not been without controversy because of perceived relativistic threats to the universality of human rights. Before turning to the nature of this controversy and its relevance to the EU, the ECJ's adoption of a comparable method of analysis is established.

2.3. Restricting the Four Freedoms

The four freedoms relating to the movement of goods, persons, services and capital[16] hold a position of pre-eminence in the EC Treaty.[17] However, despite their relative importance, they are not absolute; internal market law must provide exceptions to them. These can be characterised broadly as treaty-based justifications (eg Articles 30, 39(3), 46, and 58(1) EC) or case law exceptions (e.g. the *Cassis* 'mandatory requirements').[18]

There are at least three important issues that are pre-requisite to an explanation of the ECJ's approach to limiting free movement rights. Firstly, there is considerable discussion about the extent to which the approach of the ECJ to each of the four freedoms is similar.[19] Secondly, whilst there is some agreement that the distinction between treaty and case law justifications is diminishing,[20] there are still technical differences between them. However, the purpose of this article is to enquire into the use of the margin of appreciation doctrine by the ECJ and the resulting approach to balancing European and local values. The cases discussed below show that, on this question at least, there is a degree of commonality between each of the four freedoms *and* between the different

16. Art 14 (2) EC.
17. P. Oliver and W. Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407, 410.
18. Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon)* [1979] ECR 649, para. 8.
19. H. Jarass, 'A Unified Approach to the Fundamental Freedoms' in M Andenas & W Roth (eds), *Services and Free Movement in EU law* (OUP, Oxford, 2002), 141.
20. S. O'Leary and J. M. Fernandez-Martin, 'Judicially Created Exceptions to the Free Provision of Services' in M. Andenas and W. Roth (eds) (note 19), 172; G. Davies, *European Union Internal Market Law* (Cavendish London 2003), 131; P. Craig and G. de Búrca, *EU Law* 3rd Edn (OUP, Oxford, 2003), 660–661.

categories of exception. Thirdly, the case law since *Keck*[21] also deals with the outer limits of free movement.[22] Although *Keck* and other cases on 'selling arrangements' may raise questions relating to traditional social practices,[23] these cases do not share the characteristic discussion of rights and justified exceptions such as to render them comparable to the jurisprudence of the ECtHR.

2.4. The European Court of Justice, the Restrictions and the Margin of Appreciation

Both the treaty exceptions and the case law justifications require the ECJ to balance European aims against more local values. Questions about the suitability, necessity and proportionality of the national measure are discussed.[24] It shown here that when confronted with questions about morality, the approach of the ECJ is very similar to that taken by the ECtHR in the cases discussed above. The ECJ cases presented are not exhaustive of the cases in which the margin of appreciation has played a role. The aim is to demonstrate that the doctrine plays a role across the different categories of restriction upon the four freedoms.

In the case of *Henn and Darby,* the ECJ examined a measure having the equivalent effect of a quantitative restriction but which was purportedly justified on public policy grounds under Article 30 EC. The appellants had imported pornographic films and magazines deemed by the UK authorities to be obscene. The questions of Community law arose as a result of criminal proceedings brought against the appellants for having imported the material in question. Whilst not mentioning a 'margin of appreciation' by name, the ECJ went on to state that:

> 'Under the terms of Article 36 [now Art. 30] of the Treaty the provisions relating to the free movement of goods within the Community are not to preclude prohibitions on imports which are justified inter alia "on grounds of public morality". In principle, it is for each Member State to determine in accordance with its own scale of values and in the

21. Joined Cases C-267/91 & C-268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097
22. T. Connor, 'Accentuating the Positive: The "Selling Arrangement", the First Decade and Beyond' (2005) 54 *International and Comparative Law Quarterly* 127; A. Kaczorowska, 'Gourmet Can Have his *Keck* and Eat It!' (2004) 10 *European Law Journal* 479.
23. For example the prohibition on 'Sunday trading' in the UK in Case C145/88 *Torfaen BC* v. *B&Q Plc* [1989] ECR 3851; A. Arnull, 'What Shall We Do on Sunday' (1991) 16 *European Law Review* 112.
24. *See* generally Jans (note 4).

> form selected by it the requirements of public morality in its territory […].'[25]

The national authorities were therefore allowed some discretion to interfere with the free movement of goods deemed immoral. The language in which the ECJ expressed itself is highly reminiscent of that used by the ECtHR to justify conceding a margin of appreciation in cases such as *Handyside*.

The approach of the ECJ to public policy in the context of restrictions to the free movement of workers under Article 39(3) EC and Directive 64/221 has raised the same issue, and even more clearly follows the language of the ECtHR. In the *Van Duyn* case, the ECJ, whilst stressing that the concept of public policy cannot be determined unilaterally by each Member State, emphasised that:

> 'the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.'[26]

This reference to an 'area of discretion' plays the same role as the reference to a 'margin of appreciation' in the human rights cases discussed above. The use of the 'area of discretion' in *Van Duyn* again evidences the reluctance of the ECJ to impose one standard over pre-existing nationally constructed values.[27] Indeed, the precise words used by the ECJ to describe its practice should not provide a distraction since both the ECJ and the ECtHR operate in more than one language. In English, the terminology varies, with the ECtHR sometimes specifically referring to an 'area of discretion'[28] or a 'power of appreciation'[29] in place of a 'margin of appreciation.'

The national margin of appreciation is also visible when the ECJ examines case law exceptions. The *Gambelli* case concerned an Italian law regulating the gambling industry, and which was deemed a restriction on free movement contrary to Article 43 EC and not justified by reference to Articles 45 or 46

25. Case C-34/79 *R* v. *Henn & Darby* [1979] ECR 3795, para. 15.
26. Case 41/74 *Van Duyn* v. *Home Office* [1974] ECR 1337, para. 18; note that this case was decided *before* the ECtHR gave its judgment in *Handyside* although the principles enunciated therein had been detectible in the jurisprudence of the Court and Commission (of human rights) for some time: Hall (note 3) 481.
27. D. Pollard, 'Rights of Free Movement' in N Neuwahl & A Rosas (eds.) *The European Union and Human Rights* (Kluwer, The Hague, 1995), 114.
28. *Weeks* v. *UK* Series A No. 114 (1988) 10 EHRR 293, para. 52.
29. *De Wilde & Others* v. *Belgium* Series A No. 12 (1979–80) EHRR 373, para. 93.

EC.[30] Introducing its advice to the referring court on the application of case law justifications in the general public interest, the ECJ stated that:

> 'moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require'.[31]

Finally, the area of discretion is also visible in relation to the recently recognised human rights derogation from the free movement of goods. In the *Schmidberger* case,[32] the ECJ saw that the national court had to balance free movement of goods against free expression.[33] The ECJ recognised that neither free movement of goods nor freedom of expression is an absolute right. In some cases, protecting free expression might justify restraining the free movement of goods, and *vice versa*. The ECJ stated that the national courts would have to regard all the circumstances of the case in order to determine whether a fair balance was struck between the competing rights at stake. However, in that regard, the ECJ recognised that the competent national authorities would have a 'wide margin of discretion', subject to the restriction's necessity and proportionality.[34]

The cases presented here show that both courts have justified a moral or cultural margin of appreciation in similar terms. Following from the implications that the margin of appreciation doctrine has had for the ECtHR, it is suggested that in the heartland of its substantive law the ECJ has been presented with complex questions about the relationship between the overlapping values of the EU and its Member States.

Before examining the margin of appreciation doctrine in the internal market in more detail, we need to consider several other instances in which the ECJ and Advocates General make reference to a 'margin of appreciation'.

30. Case C-243/01 *Criminal Proceedings against Gambelli* [2003] ECR I-1577, para. 59–62
31. *Ibid.* para. 63; on gambling, free movement and the margin of appreciation *see* also the cases of *Schindler*, *Läärä* and *Zenatti*, discussed further in the text at note 113 below.
32. Case C-112/00 *Schmidberger* v. *Austria* [2003] ECR I-5659; *see* also Case C-36/02 *Omega Spielhallen- und Automatenaufitellungs-GmbH* v. *Oberbiirgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.
33. The ECJ had followed the AG's advice that it was the purpose of the authorities in allowing the demonstration (human rights), and not the purpose of the demonstration itself (environmental concerns), that formed the grounds for justification. *Schmidberger, Ibid.* para. 66–69.
34. *Ibid.* para. 82

2.5. Functionally Distinct References to a 'Margin of Appreciation'

The focus of this article is upon instances where, by virtue of the case involving a Member State's limitation of one of the four freedoms, local values are put in apparent opposition to European policies. The emergency powers that Member States have to intervene in the internal market are, therefore, comparable but will not be discussed because of their infrequent use.[35] Matters such as the review of Member States' discretion in how to *fulfil* their obligations (such as under a directive)[36] or to enforce Community law[37] are related but distinct; these might be labelled more precisely as instances of 'implementation discretion' flowing from the institutional structure of Community law rather than the nature of public policy or morals.[38]

The precise jurisdictional context in which national measures are reviewed is relevant here as well. In enforcement proceedings under Article 226 or 227, the situation in Community law is directly comparable to European human rights law; the ECJ will determine conclusively whether the national measure infringes Community law. However, under Article 234, the ECJ hands the case back to the referring court to apply the test of proportionality.[39] This, it is submitted, is a *further* instance of discretion left to the national courts, which is conferred only after a decision on the width of the appropriate margin is taken. The relationship between the margin of appreciation and the principle of proportionality is discussed in Part Four below.

The ECJ has also used the term 'margin of appreciation' when reviewing the legality of Community legislation.[40] Here, although complex moral or social choices may influence the ECJ to be less strict in its review, it is ultimately

35. Articles 297–298 EC; *see* P, Koutrakos, 'Is Article 297 a "Reserve of Sovereignty"' (2000) 37 *Common Market Law Review* 1339; In the TECE Arts 297–298 are replicated at Articles III-131 to 132.
36. E.g. Case C-7/90 *Vandevenne and Others* 1991 ECR I-4371, para. 11; Case C-383/92 *Commission* v. *United Kingdom* 1994 ECR I-2479, para. 40.
37. E.g. in relation to competition law, such as AG Tizzano in Case C-418/01 *IMS Health GmbH & Co OHG* v. *NDC Health GmbH & Co KG* [2004] 4 CMLR 28, paras 87 and 89.
38. On this point *see* S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (*Human Rights Files No. 17)* (Council of Europe Publishing, 2000), 15 & 22; J. Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1998) 19 *Human Rights Law Journal* 30, 32.
39. T. Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny' in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, 1999) 65, 77 *et seq*; an exception was Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council* v. *B & Q Plc* discussed in Jans (note 4) 248. [1992] ECR I-6635
40. E.g. Case 5/88 *Wachauf* v. *Bundesamt fur Ernahrung und Forstwirtschaft* [1989] ECR 2609, para. 22 (on regulations); Case C-166/98 *SOCRIDIS* [1999] ECR I-3791, para. 19 (on directives).

respect for the Community legislature (via the principle of non-substitution)[41] rather than respect for national culture that motivates the ECJ. The broad separation of powers issues presented here are more akin to those familiar from domestic administrative law.[42]

A margin of appreciation has also been visible in determining the direct effect of secondary legislation,[43] and when reviewing the discretion of Community institutions.[44] These cases did not raise the central issue of overlap between national public policy or morals and European aims, and are also more directly comparable to domestic administrative law.

3. A Margin of Appreciation in the Internal Market: Setting the Normative Context

3.1. 'European' and 'National' Cultures in the EU

The ECtHR's use of the margin of appreciation doctrine has been controversial because of perceptions that it undermines the universality of human rights.[45] This issue has been particularly pressing in the post-Cold War era.[46] The implication for the ECJ is not that universality as such is at risk, but rather the functioning of the internal market and the idea of Europe upon it is based.[47] The opposing risk is that the ECJ's concentration on the 'unification and primacy of EC law' would lead to a reduced role for the margin of appreciation, giving insufficient attention to Member States' national cultures and other countervailing factors such as human rights.[48]

The constituent treaties of the EC and EU tread an awkward line between emphasising 'European' identity and respecting national cultures. In response

41. Y. Arai-Takahashi, '"Scrupulous but Dynamic" – the Freedom of Expression and the Principle of Proportionality Under European Community Law' (2005) 24 *Yearbook of European Law* 27, 36.
42. Discussed at section 2.1 above.
43. In both Case C-164/90 *Muwi Bouwgroep BV* v. *Staatssecretaris van Financien* [1991 ECR I-06049 and Case C-100/89 *Kaefer and Procacci* v. *France* [1990] ECR I-4647 the Advocates General examined whether the "margin of appreciation" left by a directive prevented it from being "unconditional".
44. E.g. in the airport noise pollution case, Case C-27/00 *R* v. *Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd* [2002] ECR I-2569 para. 66.
45. E.g. E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *New York University Journal of International Law* 843, 844.
46. P. Mahoney, 'Speculating on the Future of the Reformed European Court of Human Rights' (1999) 20 *Human Rights Law Journal* 1, 3; Brems (note 9) 310; cf Sweeney (note 9).
47. G. Chu, '"Playing at killing" Freedom of Movement' (2006) 33 *Legal Issues of Economic Integration* 85, 94.
48. Douglas-Scott (note 5) 650.

to the increasing economic and cultural heterogeneity between Member States, some form of variable geometry has come to play a role in the EU's legislative process. Flexibility or closer co-operation,[49] therefore, has already raised important questions about commonality and fragmentation in the EU.[50]

The present Article 3(1)(q) EC states that one of the activities of the EC is to contribute 'to the flowering of the cultures of *the Member States*' [emphasis added]. The Treaty Establishing a Constitution for Europe ('TECE') proclaims in Article I-3 (3) that:

> "[The Union] shall respect *its* rich cultural and linguistic diversity, and shall ensure that *Europe's* cultural heritage is safeguarded and enhanced." [Emphasis added.]

The two treaties stress something slightly different; one promotes the 'culture' in so far as it belongs to Member States, whilst the other sees the Union itself as possessed of culture.

The impact of this apparent change of emphasis is difficult to gauge. Elsewhere the attitudes in the two treaties remain similarly ambivalent on the question of whether to protect 'European' or national culture. Article 151(1) EC, the language of which is replicated in Article III-280(1) TECE, states that the aim of promoting Member State cultures should be achieved,

> '[…] while respecting their national and regional diversity and at the same time bringing *the* common cultural heritage to the fore.'[51] [Emphasis added.]

At the same time as committing itself to preserving national and regional diversity, the EU's attempts to identify or construct an identity for itself assume a pre-existing common cultural heritage on which it seems increasing emphasis should be placed.

Nevertheless, Article 151 (4) EC attempts to 'mainstream' the importance of cultural diversity, stating that:

> 'The Community shall take cultural aspects into account in its action under other provisions of this Treaty, in particular in order to respect and to promote the diversity of its cultures.'[52]

49. Formally incorporated in the Community law by the Amsterdam Treaty and revised at Nice in Arts 40, 43–45 TEU; Art 11 EC.
50. S. Douglas-Scott *Constitutional Law of the European Union* (Pearson Harlow, 2002), 187 *et seq*; I. Ward, *A Critical Introduction to European Law* (2nd edn, LexisNexis, London, 2003), 56–60.
51. This language is replicated in Article III-280(1) TECE.
52. The TECE contains almost identical language in Article III-280(4).

This provision has played a negligible role in the judgments of the ECJ on restrictions to the four freedoms,[53] but, nevertheless, its existence provides a treaty-based backdrop against which to argue that a margin of appreciation is 'genetically coded' into the Community *aquis*, like other judge-made principles of Community law.[54] Indeed, it puts the existence of a moral or cultural margin of appreciation on a firmer legislative footing than in respect of the European Convention on Human Rights where the only sign that a margin of appreciation might be appropriate is the open-ended language used to define the rights and limitations themselves.[55]

3.2. Rights, Public Interests and Essential Contestation

Although what is ultimately at stake for the ECtHR and the ECJ differs (the universality of human rights or the functioning of the internal market), the types of diversity recognised by the margin of appreciation are of the same order. In the Convention system, the balance is between public interests and human rights.[56] In the EU, it is between public interests and economic freedoms. In neither system does the state that relies upon the public interest-motivated restriction challenge the relevance of human rights in general to their society, or their overall commitment to the internal market. Paul Mahoney, who is now the registrar of the ECtHR, has observed that to recognise 'legitimate cultural diversity' via the margin of appreciation is not the same as cultural relativism.[57] Eva Brems suggests that the doctrine gives a merely corrective role to local values; it is a 'limited counterbalance to the general universalist rule.'[58]

Indeed, the real problem for states is squaring their *particular* ground for restriction with the *general* and overarching benefits that accrue from participation in each system. It is here where the margin of appreciation is relevant, with an assumption common to both systems not only that public interests have different weights (and content) from place to place and from time to time but also that these differences should be respected.

53. In *Bosman,* the ECJ actually appeared to deny the relevance of Art 151 EC (then Art 128) to determining the scope of the fundamental freedoms (Case C-415/93 *Bosman* [1995] ECR I-4921 para. 78), although its reasoning is scant.
54. G. F. Mancini, *Democracy and Constitutionalism in the European Union* (Hart, Oxford, 2000), 44; questions about the activism of the ECJ and its legitimacy are briefly addressed in section 4.1 below.
55. P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 *Human Rights Law Journal* 1, 2; Arai-Takahashi (note 7) 238; Brems (note 9) 294 notes that this type of margin left by legislation is something with which all courts have to deal.
56. Greer (note 38) 32.
57. *Ibid*.
58. Brems (note 9) 310.

It is conceded that occasionally both courts have allowed a margin as regards the definition of the right in question, rather than on the question of balancing it against another public interest.[59] This is problematic because, although the responsibility for applying the law is shared between national and international bodies (hence the margin of appreciation), the responsibility for interpreting it is solely the province of the relevant European court.[60] Any other approach could indeed signal challenges to the universality of human rights, and would allow the ECJ to abdicate control over EU-wide definitions that are integral to the internal market.

In Community law, the impact of morals upon the definition of free movement rights has tended not to present these risks. One area where this issue has arisen is whether particular allegedly immoral acts can constitute an 'economic activity' such as abortion in *Grogan*[61] or prostitution in *Jany*,[62] thus engaging the freedom to provide and receive services. The ECJ has stated that 'it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral activity is practised legally'.[63] In practice, the definitional margin of appreciation in these cases, which allows for the possibility of allegedly immoral activities being differently regulated across the EU, actually works against the Member State attempting to restrict free movement. In *Jany,* it is used as a step towards demonstrating that a host state cannot take action against non-nationals that it does not take against its own.[64] In *Grogan,* it is used simply to remove the need for argumentation 'on the moral plane' as to whether Member States should allow abortion to be lawfully practiced.[65] Although expressed in terms of deference to Member States' own scale of values, this type of margin thus masks the promotion of the internal market. Indeed its effects only make it more important that national characteristics are taken seriously at the stage of justification.

It is also preferable in legal terms to concentrate on the reasons for restriction because the definition stage, as Jarass put it, does not involve the 'weighing up of colliding public goods' whereas the justification stage more easily facilitates the valuable proportionality test.[66] This was precisely the approach taken by Advocate General Van Gerven in *Grogan*.

59. *Vo* v. *France* (2005) 40 EHRR 12 is a recent and controversial example from the European Court of Human Rights.
60. P. van Dijk and G. van Hoof, *Theory and practice of the European Convention on Human Rights* (Kluwer, The Hague, 1998), p. 71 *et seq*.
61. Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan and others* [1991] ECR I-4685.
62. Case C-268/99 *Jany and Others* v. *Staatssecretaris van Justitie* [2001] ECR I-8615.
63. *Ibid*. para. 56.
64. *Ibid*. para. 60, following Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665.
65. *Grogan* (note 61) para. 20.
66. Jarass (note 19) 155.

The characteristic weighing up of 'national' and 'European' values facilitated by the margin of appreciation at the justification stage reflects that the EU is comprised of several interlocking normative spheres.[67] The sphere of Member States' normatively 'thin' commitment to the internal market, including guaranteeing the four freedoms and prohibiting distortions to competition, exists in conjunction with the sphere of their normatively 'thick' and multitudinous national public policies.

Values begin 'thickly', located in particular societies.[68] They become refined and expressed thinly in times of stress. In this way, the thin commitment to the internal market can be seen as being borne originally out of functionalist concerns about rebuilding Europe and preventing further conflict after World War Two. It is because thickly constituted values are the *starting place* for European integration that the ECJ rightly allows a margin within which their continued presence is accommodated. The challenge is to see the relationship between interlocking normative spheres not as a crisis, but as part of the everyday life of a EU that is essentially contested and thus in a constant state of flux.[69]

After the *Grogan* case, at least one commentator called for the adoption of a European morality directive to 'unite the disparate approaches to moral issues in the Member States'.[70] Such an approach is impractical and would fail to deal with the ongoing, evolutive and nuanced reality of Europe's interlocking moralities. By attempting to solve the issue once and for all, in advance, it goes further than is necessary and therefore also violates the principles of subsidiarity and proportionality.

In contrast, the jurisprudence of the ECJ on 'margins of appreciation', with its discussion of complex inter-related factors that might justify a national restriction, is capable of capturing the essentially contested essence of the EU.

67. Z. Bańkowski and E. Christodoulidis, 'The European Union as an Essentially Contested Project' in Z. Bańkowski and A. Scott (eds) *The European Union and its Order* (Blackwell, Oxford, 2000), 17.
68. M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, Notre Dame, 1994), 4; on applying Walzer's work to human rights and the margin of appreciation doctrine *see* J. Chan, 'Thick and Thin Accounts of Human Rights: Lessons from the Asia values debate' in M. Jacobsen and J. Bruun (eds) *Human Rights and Asian Values* (Curzon, Richmond, 2000), R. Mullender, 'Human Rights: Universalism and Relativism' (2003) 6 *Critical Review of International and Social Political Philosophy* 70; J. A. Sweeney, 'Human Rights, Cultural Dialogue and the Margin of Appreciation' *Human Rights Law Review Student Supplement 2000–2001* (University of Nottingham Human Rights Law Centre, 2001); J. A. Sweeney, *Human Rights, Cultural Relativity and the European Court of Human Rights* (PhD Thesis on file at the University of Hull, 2003); Sweeney (note 9).
69. Z. Bańkowski and E. Christodoulidis (note 67) 18.
70. D. O'Connor, 'Limiting 'Public Morality' Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union' (1997) 22 *Brooklyn Journal of International Law* 695, 733.

It allows the impulses of European commonality and national particularism visibly to interact but never fully to defeat each other. Moreover, demonstrating a commitment to local values and conditionally devolving the balancing of these overlapping values to national institutions via the margin of appreciation doctrine reiterates a commitment to subsidiarity allowing the balancing of overlapping values to take place withing national institutions via the margin of appreciation doctrine reiterates a commitment to subsidiarity.[71]

The notion of subsidiarity thus is used here not in its political and faintly Euro-sceptic sense, but as a means of internalising the questions of sovereignty raised by the jurisdiction of the ECJ. The notion of subsidiarity suggests some degree of loyalty to or (at least) a relationship with a central norm whereas relativism challenges the application of the norm outright. The internalisation and normalisation of questions about commonality and fragmentation, about 'European' identity and national public policies, becomes a reflection of the EU's nature. According to this view, there is no longer a series of individual and bi-polar conflicts between Member States and the EU, but a continual series of structured interactions along the subsidiarity continuum within a healthy and diverse EU.

It is against this normative background, which values diversity, subsidiarity and a dynamic approach to European identity and national public policies, that the practice of the ECJ is now examined. The two most important issues here are the existence of the margin's outer limits and some principles to guide its width in particular cases.

4. The Margin of Appreciation in Operation

4.1. The Margin's Outer Limits in Historical Context

The margin of appreciation doctrine is poised to play an important role, but whether it can do so in practice remains to be seen. If we are to maintain the position that the doctrine does not threaten underlying notions of European commonality, then it must be shown to have outer limits. This, in turn, depends upon the authority and legitimacy of the court imposing the limits. In the human rights context, the existence of such limits has been questioned, with the implication that the doctrine might lead states to resist review altogether on certain questions.[72] An historical analysis of the doctrine's use by the ECtHR suggests that there are in fact outer limits to it, but that for strategic reasons they were more difficult to perceive in its early period of operation.

71. L. Gormley, 'Pay Your Money and Take Your Chance' (1994) 19 *European Law Review* 644, 650; O'Leary and Fernandez-Martin (note 20) 413.
72. Benvenisti (note 45) 844.

The ECtHR's early use of the margin of appreciation doctrine appeared highly deferential, but this was a tactical response to the 'fragile foundations'[73] upon which the system was based. The doctrine's early use represented a conscious strategy based upon the ECtHR's self-preservation.[74] The ECtHR sought to prevent 'damaging confrontations'[75] with Member States during the time when its jurisdiction and the right of individual petition were optional[76] and the memory of the Greek denunciation of the Convention was fresh.[77] Whilst its continued use is not justified for these reasons alone,[78] the margin of appreciation doctrine played a valuable role during the Convention system's consolidation. However, once the system had matured, the doctrine was transformed from a transitional and rhetorical tool into one that allowed the ECtHR to require increasingly detailed justifications from Contracting Parties where they sought to limit human rights. Although, even in its early jurisprudence, the ECtHR was keen to demonstrate that its review functions were not ousted by reference to the margin of appreciation doctrine,[79] cases such as *Sunday Times* v *UK*[80] in 1979 mark a point at which the ECtHR took on a more consciously assertive role[81] and articulated outer limits to the width of the margin.

The ECJ, by contrast, has not had to work quite so intensely or independently to establish its own legitimacy; this has been established and maintained alongside other developments in European integration.[82] This is to not say that questions about the ECJ's legitimacy have not arisen,[83] but that they are often separate to questions about the legitimacy of the EU project itself. Indeed, the ECJ's propensity for activism was probably *more* visible in its

73. R. St. J. Macdonald, 'The Margin of Appreciation' in R St J Macdonald et al (eds.) *The European System for the Protection of Human Rights* (Kluwer, The Hague, 1993), 123.
74. Brems (note 9) 297.
75. *Ibid.*
76. Protocol 11, which came into effect in 1998 altered the Convention system in both respects; N. Brazta and M. O'Boyle, 'The Legacy of the Commission to the New Court Under the Eleventh Protocol' (1997) 3 *European Human Rights Law Review* 211; A. Drzemczewski, 'The Internal Organisation of the European Court of Human Rights: The Composition of Chambers and the Grand Chamber' (2000) 3 *European Human Rights Law Review* 233; N. Rowe and V. Schlette, 'The Protection of Human Rights in Europe After the Eleventh Protocol to the ECHR' (1998) 23 *European Law Review*, Supp HRS 3.
77. Greece left the Convention system in 1969, when several Contracting Parties sought to bring inter-state actions following the Greek Colonels' assumption of power in 1967. Greece re-joined the ECHR system in 1974 after the Colonels' dictatorship fell; M. Janis *et al* (note 11) 61–63.
78. Arai-Takahashi (note 7) 232.
79. *Handyside* v. *UK* (note 15) para. 49.
80. *Sunday Times* v. *UK* (note 14).
81. Yourow (note 7) 56; Jones (note 10) 437.
82. Of which the debate surrounding the TECE is just one; A Estella, 'Constitutional Legitimacy and Credible Commitments in the European Union' (2005) 11 *European Law Journal* 22.
83. The parameters of the debate about ECJ's activism are sketched in Douglas-Scott (note 50) 210 *et seq*.

early jurisprudence than at present.[84] The use of the margin of appreciation doctrine by the ECJ has therefore continually been more reminiscent of the stricter post-1979 jurisprudence of the ECtHR. Even in the 1974 *Van Duyn* case, where the ECJ ultimately allowed a rather wide margin of appreciation, it had emphasised that,

> 'the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community.'[85]

The rhetorical or transitional use of the margin of appreciation doctrine is tied to the circumstances of the court that applies it. The conditions that gave rise to deference in the early jurisprudence of the ECtHR do not apply to the ECJ, and so the doctrine's use within the EU has sufficiently clear outer-limits to guard against fragmentation. In addition, this author has argued elsewhere that the ECtHR has not returned to its earlier, more deferential ways in respect of the states from central and Eastern Europe.[86] Indeed, in the light of the success of earlier efforts to establish its legitimacy, the ECtHR has been able to maintain a stricter line with the new Contracting Parties than with the original ones.[87] This is worth considering as the EU continues its own enlargement.

4.2. Proportionality and Standards of Review

If we can accept that there are outer limits to the margin of appreciation, then we must begin to examine the factors that might guide its width. This is, by no means, uncontroversial. In the human rights context, the margin of appreciation has been criticised for lacking standards for its application[88] or, in the alterative, of tending to promote double standards.[89] Even the doctrine's coherence as a viable legal doctrine has been challenged.[90] Whilst broadly sup-

84. Douglas-Scott (note 50) 219 *et seq.*
85. *Van Duyn* v. *Home Office* (note 26) para. 18.
86. Sweeney (note 9) 467–469
87. M. Dembour and M. Krzyzanowska-Mierzewska, 'Ten Years On: The Voluminous and Interesting Polish Case Law' (2004) *European Human Rights Law Review* 517, 517; J. A. Sweeney, 'Divergence and Diversity in Post-Communist European Human Rights Cases' (2005) 21 *Connecticut Journal of International Law* 1, 22.
88. A. Lester, 'Universality Versus Subsidiarity: a Reply' (1998) 1 *European Human Rights Law Review* 73, 76
89. Benvenisti (note 45) 844.
90. Greer (note 38), 32; R. Higgins, 'Derogations Under Human Rights Treaties' (1976–1977) 48 *British Yearbook of International Law* 281, 315.

porting the pragmatic or rhetorical role fulfilled by the doctrine, the influential writer and former judge of the ECtHR, Ronald St. J. Macdonald has argued that it is difficult to see a common denominator in its various applications.[91]

De Búrca has identified a similar generic problem for the ECJ, and O'Leary and Fernández-Martin have discussed it with specific reference to the judicially created exceptions to the free provision of services. The latter have questioned the existence of guidelines for the ECJ to follow in order to determine whether a case has sufficiently sensitive moral or ethical issues for 'proportionality not to apply'.[92] However, it is submitted that the real problem for the ECJ is not whether to apply the proportionality principle at all, but *which* proportionality test to apply.[93]

The idea of a relationship between proportionality and differing standards of review is already well recognised in the jurisprudence of the ECJ.[94] When the factors at stake involve mediation between local and European values, it is appropriate for the ECJ to form conclusions as to the width of the national margin to be permitted. In some circumstances, the factors will combine in such a way that the ECJ will allow a wide margin of appreciation for Member States to assess measures themselves. This does not prove that the proportionality test was never applied.[95] It simply demonstrates that depending on the *prima facie* margin permitted in the case, and the reasons adduced for conceding it, a different threshold must be passed for the measure to be proportionate.

Enhanced engagement with the margin of appreciation doctrine provides a structure upon which to hang a discussion of factors relevant to the level of scrutiny to be applied by the ECJ in particular cases.[96] This encourages a degree of specificity from national governments, ensuring that they identify exactly which national interests are at stake and thereby facilitates an assessment of whether the measures taken go beyond what is needed to protect them.[97] Consequently, this would discourage the sort of over-broad restriction that might seem to undermine the idea of the internal market.[98] Although often expressed as a conclusion *ex post facto* that a state's actions were or were not within its margin of appreciation, finding the width of the margin is thus an

91. Macdonald (note 73) 122.
92. O'Leary and Fernandez-Martin (note 20) 192.
93. Jans, (note 4) 263, likewise argues that 'there is no such thing as *the* application of the proportionality principle'. [Emphasis as per the original].
94. Craig and de Búrca (note 20) 373; G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International* Law 38, 55 who equates gradation in the standards of review with subsidiarity.
95. Craig and de Búrca (note 20) 379.
96. Cf Arai-Takahashi (note 7) 193; Arai-Takahashi (note 41) 51.
97. Davies (note 25) 113.
98. *See* Chu's discussion of whether 'human dignity' in *Omega Spielhallen* (note 32) (discussed further at note 118 below) was a specific enough aim to justify restricting free movement of services; Chu (note 47).

intrinsically valuable pre-requisite step to applying a test of proportionality and arriving at such a conclusion. Such an approach is particularly useful in determining the advice to be given to a national court under Article 234, concerning the application of proportionality test in its strict sense.[99]

The task for the ECJ is therefore to chart relevant factors for deciding upon the width of the margin and to engage with Member States on the question of their relative weight, with particular care when morally or culturally resonant issues are to the fore.

4.3. The Width of the Margin of Appreciation

For both courts, factors relevant to the width of the margin have included which right is being restricted, the context in which the right it is invoked, and which legitimate aim (reason for restriction) is pursued.[100] Both also use some comparative methodology in order to consider the impact of European consensus on the issue. In this section, the focus is upon the role that human rights play within this matrix of factors, and on the question and relevance of European consensus.

It is clear from the *ERT* case[101] that restrictions to any of the internal market rights must, in order to be compatible with Community law, also be compatible with the Human Rights Convention.[102] In particular, the human rights element to the free movement rights of workers suggests that restrictions to their exercise be treated very carefully, even where a cultural or moral interest is asserted by the Member State. On the free movement of workers, there is a direct overlap between the jurisprudence of the ECJ and the ECtHR, as identified by Stephen Hall some time ago. His work examined the impact of Article 2 of the fourth protocol to the Human Rights Convention upon the interpretation of the then Article 48(3) EC (now Article 39(3) EC). Hall

99. Ward, (note 50) 118–122, notes the inadequacy of the advice given to UK courts on the application of the proportionality test in the 'Sunday trading' cases (note 23), resulting eventually in the *Stoke-on-Trent* case indicated at note 39 above.

100. On the ECJ *see* Gormley (note 71); G. de Búrca, 'The Principle of Proportionality and its Application in EC law' (1993) 13 *Yearbook of European Law* 105, 111; Arai-Takahashi (note 41); On relevant factors for the Court of Human Rights *see* Arai-Takahashi (note 7) 206 *et seq*; Brems (note 9) 256 *et seq* and Mahoney (note 55) 5 *et seq*; van Dyke and van Hoof (note 60) 87 *et seq*.

101. Case C-260/89 *ERT* [1991] ECR 2925.

102. J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 *Legal Studies* 227 describe this case as an aspect of the ECJ's 'offensive' use of human rights, in the sense that the ECJ actively pursued the protection of human rights. They contrast this with earlier cases where the ECJ relied in the idea of human rights 'defensively' in order to establish and maintain the supremacy of EC law (e.g. in Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125).

described the approaches of the two courts to assessing limitations upon free movement as 'strikingly similar'.[103]

Human rights, in these examples, promote internal market rights and correspondingly limit the margin of appreciation. It is perhaps unsurprising that the ECJ would be most receptive to human rights protection (and least receptive to a national margin of appreciation) when it has a secondary effect of promoting free movement within the internal market.[104] We should be cautious of attempts to co-opt the idea of human rights as an excuse to prioritise free movement over free thinking.

Interestingly, since the *Schmidberger* case, the protection of human rights in national law has been recognised as a legitimate public interest that might serve to *limit* the free movement of goods.[105] In this sense, the presence of a human rights element can also widen the scope of the margin within which Member States can interfere with internal market rights.

There is not space here to chart further the often-ambivalent approach of the ECJ to human rights.[106] It is sufficient to show that the level of discretion left to Member States to limit internal market rights is affected by the particular right that is claimed and the context in which it is exercised, including any human rights elements. It is nevertheless important to disaggregate the two types of margin present where EC law overlaps with European human rights law; one relates to a margin within which internal market rights may be limited, and the other relates to limiting human rights. The width of the margin of appreciation given to the same countervailing public policy might be quite different depending upon whether the matter is seen as primarily a human rights or economic freedoms case.

The aim pursued by the restrictive measure also plays a role in the way that the ECJ uses the margin of appreciation doctrine. The ECtHR is fairly explicit in this respect, and has compared the objectivity of different legitimate aims. For example, it has held that the aim of protecting the 'authority of judiciary' is more objectively determinable than the 'protection of morals'.[107] More recently, the ECtHR has examined not only whether the restriction falls within a legitimate aim listed in the Convention, but also seems to have examined what

103. Hall (note 3) 481.

104. *See* D. Phelan, 'Right to Life of the Unborn v. Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union' (1992) 55 *Modern Law Review* 670.

105. *See Schmidberger* v. *Austria*, discussed in the text at note 32 above, and also *Omega Spielhallen* (note 32) discussed further at note 118 below.

106. Coppel and O'Neill (note 102); A. Toth, 'The European Union and Human Rights: the Way Forward?' (1997) 34 *Common Market Law Review* 491; K. Lenaerts and E. de Smijter, 'A "Bill of Rights" for the EU' (2001) 38 *Common Market Law Review* 273.

107. *Sunday Times* (note 14) para. 59.

the aim means in the context of the state putting it forwards.[108] Although it was established above that the ECJ tends to leave a margin of appreciation in cases where the public policy or morality justification is motivated, this is still a factor that the ECJ could develop. For example, even within the realm of public policy and morals, if the specific aim is capable of a relatively objective assessment, and the State does not provide specific enough information to allow this to transpire, then the ECJ should apply a strict test of proportionality. In *Lindman,* the ECJ seemed already receptive to this approach.[109]

Finally, both courts have undertaken comparative analysis of domestic legal systems in order to assist arriving at a conclusion.[110] Where the ECtHR has found a Contracting Party to be in an isolated or outdated position, it has narrowed their margin of appreciation and made reference to the practice of the majority of Contracting Parties.[111] However, where there is a lack of European consensus, the margin of appreciation tends to be correspondingly wider.[112]

The ECJ case of *Schindler*,[113] which concerned non-discriminatory restrictions to the free provision of lottery services in the UK, shows the existence of consensus playing a slightly different role. Here the ECJ noted the 'moral, religious and cultural aspects of lotteries' and that the '*general tendency of the Member States* is to restrict, or even prohibit, the practice of gambling and to prevent it from being a source of private profit'.[114] This, amongst other factors, justified national authorities having a 'sufficient degree of latitude' in how (and whether) to protect lottery players and society at large.[115] Thus, the general consensus that such matters were appropriate for regulation due to their moral, religious and cultural implications resulted in an apparently wide margin of appreciation.

In a line of cases since *Schindler,* the ECJ has stressed that the necessity and proportionality of a national restrictive measure will not be excluded simply because Member States do not share the same conception of the fundamental right or legitimate interest put forwards[116] and, thus, have chosen a different

108. Sweeney (note 87) 25 *et seq.*
109. Case C-42/02 *Lindman* [2003] ECR I-13519, para. 26.
110. F. Matsher, 'Methods of Interpretation of the Convention' in R St J Macdonald et al (eds) (note 73) 74; van Dyke and van Hoof (note 60) 87; Brems (note 9) 279; Mahoney (note 55) 5.
111. E.g. on the persistence of corporal punishment on the Isle of Man in *Tyrer* v. *UK* Series A No. 26 (1979–80) 2 EHRR 1.
112. E.g. in *X, Y and Z* v. *United Kingdom* Reports 1997–II (1997) 24 EHRR 143 para. 44.
113. Case C-275/92 *Schindler* [1994] ECR I-1039.
114. *Ibid.*, para. 60; cf *Gambelli* (note 30) para. 63, which does not make the same reference to the general tendencies of Member States but does use the term 'margin of appreciation' in place of 'sufficient degree of latitude'.
115. *Ibid.*, para. 61.
116. *Omega Spielhallen* (note 32) para. 37.

system for protecting that right or interest.[117] The approach was particularly clear in *Omega Spielhallen*,[118] where the ECJ allowed a considerable 'margin of discretion'[119] within which Germany could restrict the free movement of services in order to protect its conception of human dignity.[120]

A flexible approach to consensus analysis is to be welcomed because over-reliance upon consensus contains an inbuilt conservatism[121] that can suppress minority voices,[122] leading to difficult situations where one state maintains an isolated moral position.[123] Nevertheless, consensus analysis may still play a legitimate role because it does not exist in isolation. As Mahoney argued, it is a 'pointer' that can be corroborated by other factors.[124]

The broad factors sketched in this section work together so that a balance between them is struck. For example, where the importance of the right is particularly profound, then a lack of consensus may be of only peripheral value in assessing its restriction. Where the public interest motivated by the Member State is of exceptional importance and is raised with sufficient precision, this may outweigh that their position is at odds with a more general European consensus.

Nevertheless, it is clear that the operation of the margin of appreciation doctrine is complex. In the human rights context, it has been observed that even if factors can be regularly identified, at the very least, it is difficult to predict what conclusion the ECtHR will reach in a given case.[125] The argument that the factors relevant to the width of the margin of appreciation are complex is thus more compelling than the argument that there is no standard for its application at all. However, as suggested in Part Three, the mere process of identifying and balancing the relevant factors is an end in itself and reflects the reality of an essentially contested EU.

5. Conclusion

In this article, the use and potential of the margin of appreciation doctrine by the ECJ has been compared to its use by the ECtHR. The ultimate theme is not only that the doctrine is used by the ECJ, but that its examination can

117. *See* Case C-124/97 *Läärä* [1999] ECR I-6067 para. 36; Case C-67/98 *Zenatti* [1999] ECR I-7289 para. 34; Case C-6/01 *Anomar and Others* 2003 ECR I-8621, para. 80.
118. *Omega Spielhallen* (n32) para. 38.
119. The term is introduced at para. 31.
120. *See* generally Chu (note 47).
121. Brems (note 9) 285.
122. Benvenisti (note 45) 850; Brems (note 9) 285.
123. Brems (note 9) 282; O'Leary and Fernandez-Martin (note 20) 93.
124. Mahoney (note 55) 5.
125. Van Dijk and van Hoof (note 60) 91.

provide lessons leading to a deeper understanding of universality and particularism in the EU.

The issues raised in this article have touched upon some major topics of EU law. These have included the nature and identity of the EU, the substantive Community law of the four freedoms, the activism of the ECJ and the concepts of subsidiarity and proportionality. The purpose here has been to link them to the common thread of universality and particularism, at a time when the EU has recently undergone its most radical expansion. It is vitally important that the EU recognises the impact that even the ECJ's four freedoms jurisprudence has on the interaction of local and broader European values. The analysis of the case law presented here has suggested that the idea of a judicially recognised 'margin of appreciation', where Member States' morals and public policies come into conflict with free movement rights, can play an important role in an essentially contested EU.

Bibliography

M. Andenas and W. Roth (eds), *Services and Free Movement in EU law* (OUP, Oxford, 2002)

Y. Arai-Takahashi, 'Discretion in German Administrative Law: Doctrinal Discourse Revisited' (2000) 6 *European Public Law* 69

Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Oxford, 2002)

A. Arnull, 'What Shall We Do on Sunday' (1991) 16 *European Law Review* 112

Y. Arai-Takahashi, '"Scrupulous but Dynamic" – the Freedom of Expression and the Principle of Proportionality under European Community Law (2005) 24 *Yearbook of European Law* 27

Z. Bańkowski and A. Scott (eds), *The European Union and its Order* (Blackwell, Oxford, 2000)

E. Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1999) 31 *New York University Journal of International Law* 843

K. L. Boyd, 'Are Human Rights Political Questions?' (2001) 53 *Rutgers Law Review* 277

N. Brazta and M. O'Boyle, 'The Legacy of the Commission to the New Court under the Eleventh Protocol' (1997) 3 *European Human Rights Law Review* 211

E. Brems, 'The Margin of Appreciation Doctrine in the Case-law of the European Court of Human Rights' (1996) 56 *Zeitschrift fur Auslandisches offenthiches recht und volkerrecht* 240

G. de Búrca, 'The Principle of Proportionality and its Application in EC law' (1993) 13 *Yearbook of European Law* 105

G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 *American Journal of International* Law 38

J. Chan, 'Thick and Thin Accounts of Human Rights: Lessons from the Asia values debate' in M. Jacobsen and J. Bruun (eds), *Human Rights and Asian Values* (Curzon Richmond 2000)

G. Chu, '"Playing at killing" Freedom of Movement' (2006) 33 *Legal Issues of Economic Integration* 85

T. Connor, 'Accentuating the Positive: The "Selling Arrangement", the First Decade and Beyond' (2005) 54 *International and Comparative Law Quarterly* 127

J. Coppel and A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 12 *Legal Studies* 227

P. Craig and G. de Búrca, *EU Law* 3rd Edn (OUP, Oxford, 2003)

G. Davies, *European Union Internal Market Law* (Cavendish, London, 2003)

M. Dembour and M. Krzyzanowska-Mierzewska, 'Ten Years On: The Voluminous and Interesting Polish Case Law' (2004) *European Human Rights Law Review* 517
D. L. Donoho, 'Autonomy, Self-governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights' (2001) 15 *Emory International Law Review* 391
B. Doolan, *Lawless v Ireland (1957–61): The First Case Before the European Court of Human Rights, An International Miscarriage of Justice?* (Ashgate, Aldershot, 2001)
S. Douglas-Scott, *Constitutional Law of the European Union* (Pearson Harlow, 2002)
S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights *Aquis*' (2006) 43 *Common Market Law Review* 629
A. Drzemczewski, 'The Internal Organisation of the European Court of Human Rights: The Composition of Chambers and the Grand Chamber' (2000) 3 *European Human Rights Law Review* 233
P. van Dyke and G. J. H. van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer, The Hague, 1998)
E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Hart, Oxford, 1999)
A. Estella, 'Constitutional Legitimacy and Credible Commitments in the European Union' (2005) 11 *European Law Journal* 22
L. Gormley, 'Pay Your Money and Take Your Chance' (1994) 19 *European Law Review* 644
S. Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (*Human Rights Files No. 17)* (Council of Europe Publishing, 2000)
S. Hall, 'The European Convention on Human Rights and Public Policy Exceptions to the Free Movement of Workers under the EEC Treaty' (1991) 16 *European Law Review* 466
R. Higgins, 'Derogations Under Human Rights Treaties' (1976–1977) 48 *British Yearbook of International Law* 281
M. Janis *et al*, *European Human Rights Law* 2nd Edn (OUP, Oxford, 2000)
J. Jans, 'Proportionality Revisited' (2000) 27 *Legal Issues of Economic Integration* 239
H. Jarass, 'A Unified Approach to the Fundamental Freedoms' in M. Andenas and W. Roth (eds), *Services and Free Movement in EU law* (OUP, Oxford, 2002)
T. H. Jones, 'The devaluation of human rights under the European Convention' (1995) *Public Law* 430
A. Kaczorowska, 'Gourmet Can Have his *Keck* and Eat It!' (2004) 10 *European Law Journal* 479
P. Koutrakos, 'Is Article 297 a "Reserve of Sovereignty"' (2000) 37 *Common Market Law Review* 1339
K. Lenaerts and E. de Smijter, 'A "Bill of Rights" for the EU' (2001) 38 *Common Market Law Review* 273
A. Lester, 'Universality Versus Subsidiarity: a Reply' (1998) 1 *European Human Rights Law Review* 73
R. St. J. Macdonald *et al* (eds), *The European System for the Protection of Human Rights* (Kluwer The Hague 1993)
P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 *Human Rights Law Journal* 1
P. Mahoney, 'Speculating on the Future of the Reformed European Court of Human Rights' (1999) 20 *Human Rights Law Journal* 1
G. F. Mancini, *Democracy and Constitutionalism in the European Union* (Hart Oxford 2000)
J. G. Merrills and A. H. Robertson, *Human Rights in Europe*, 4th Edn (Manchester University Press, Manchester, 2001)
R. Mullender, 'Human Rights: Universalism and Relativism' (2003) 6 *Critical Review of International and Social Political Philosophy* 70
N. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (Kluwer, The Hague, 1995)
D. O'Connor, 'Limiting 'Public Morality' Exceptions to Free Movement in Europe: Ireland's Role in a Changing European Union' (1997) 22 *Brooklyn Journal of International Law* 695
P. Oliver and W. Roth, 'The Internal Market and the Four Freedoms' (2004) 41 *Common Market Law Review* 407

C. Ovey and R. White, *Jacobs and White – European Convention on Human Rights* (OUP, Oxford, 2002)
D. Phelan, 'Right to Life of the Unborn v Promotion of Trade in Services: The European Court of Justice and the Normative Shaping of the European Union' (1992) 55 *Modern Law Review* 670
E. Psychogiopoulou, 'EC State Aid Control and Cultural Justifications' (2006) 33 *Legal Issues of Economic Integration* 3
J. Rehman, *International Human Rights Law* (Pearson Harlow, 2003)
N. Rowe and V. Schlette, 'The Protection of Human Rights in Europe after the Eleventh Protocol to the ECHR' (1998) 23 *European Law Review*, Supp HRS 3
Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International law? (2006) 16 *European Journal of International Law* 907
J. Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights' (1998) 19 *Human Rights Law Journal* 30
R. Singh, 'Is There a Role for the "Margin of Appreciation" in National Law after the Human Rights Act' (1999) 1 *European Human Rights Law Review* 15
H. Steiner and P. Alston, *International Human Rights in Context* 2nd Edn (OUP, Oxford, 2000)
J. A. Sweeney, 'Human Rights, Cultural Dialogue and the Margin of Appreciation' *Human Rights Law Review Student Supplement 2000–2001* (University of Nottingham Human Rights Law Centre, 2001)
J. Sweeney, *Human Rights, Cultural Relativity and the European Court of Human Rights* (PhD Thesis on file at the University of Hull, 2003)
J. A. Sweeney, 'Domestic Judicial Deference and the ECHR in the UK and Netherlands' (2003) 11 *Tilburg Foreign Law Review* 439
J. A. Sweeney, 'Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War era' (2005) 54 *International and Comparative Law Quarterly* 459
J. A. Sweeney, 'Divergence and Diversity in Post-Communist European Human Rights Cases' (2005) 21 *Connecticut Journal of International Law* 1
A. Toth, 'The European Union and Human Rights: the Way Forward?' (1997) 34 *Common Market Law Review* 491
M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, Notre Dame, 1994)
I. Ward, *A Critical Introduction to European Law* 2nd Edn (LexisNexis London 2003)
I .Ward, 'The Culture of Enlargement' (2005) 12 *Columbia Journal of European Law* 199
H. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer, The Hague, 1996)

Cases

ECJ (by number)
Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125
Case 41/74 *Van Duyn* v. *Home Office* [1974] ECR 1337
Case 120/78 *Rewe-Zentral AG* v. *Bundesmonopolverwaltung fur Branntwein (Cassis de Dijon*) [1979] ECR 649
Case C-34/79 *R* v. *Henn & Darby* [1979] ECR 3795
Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665
Case 5/88 *Wachauf* v. *Bundesamt fur Ernahrung und Forstwirtschaft* [1989] ECR 2609
Case C145/88 *Torfaen BC* v. *B&Q Plc* [1989] ECR 3851
Case C-100/89 *Kaefer and Procacci* v. *France* [1990] ECR I-4647
Case C-260/89 *ERT* [1991] ECR 2925
Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371
Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan and others* [1991] ECR I-4685

Case C-164/90 *Muwi Bouwgroep BV* v. *Staatssecretaris van Financien* [1991] ECR I-6049
Cases C-267/91 & C268/91 *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6097
Case C-275/92 *Schindler* [1994] ECR I-1039
Case C-383/92 *Commission* v. *United Kingdom* [1994] ECR I-2479
Case C-415/93 *Bosman* [1995] ECR I-4921
Case C-124/97 *Läärä* [1999] ECR I-6067
Case C-67/98 *Zenatti* [1999] ECR I-7289
Case C-166/98 *SOCRIDIS* [1999] ECR I-3791
Case C-268/99 *Jany and Others* v. *Staatssecretaris van Justitie* [2001] ECR I-8615
Case C-27/00 *R* v. *Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd* [2002] ECR I-2569
Case C-112/00 *Schmidberger* v. *Austria* [2003] ECR I-5659
C-6/01 *Anomar and Others* [2003] ECR I-8621
Case C-243/01 *Criminal Proceedings against Gambelli* [2003] ECR I-1577
Case C-418/01 *IMS Health GmbH & Co OHG* v. *NDC Health GmbH & Co KG* [2004] 4 CMLR 28
Case C-36/02 *Omega Spielhallen- und Automatenaufitellungs-GmbH* v. *Oberbiirgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609
Case C-42/02 *Lindman* [2003] ECR I-13519

UK and ECHR cases (alphabetically)

Brown v. *Stott* [2003] 1 AC 681
De Wilde & Others v. *Belgium* Series A No. 12 (1979–80) EHRR 373
Handyside v. *UK* Series A No. 24 (1979–80) 1 EHRR 737
International Transport Roth GmbH v. *Secretary of State for the Home Department* [2003] QB 728
Kruslin v. *France* (1990) 12 EHRR 547
R v. *DPP Ex parte Kebilene* [2000] 2 AC 326
Silver v. *UK* Series A No. 161 (1983) 5 EHRR 347
Sunday Times v. *UK* (1979–80) 2 EHRR 245
Tyrer v. *UK* Series A No. 26 (1979–80) 2 EHRR 1
Weeks v. *UK* Series A No. 114 (1988) 10 EHRR 293
X, Y and Z v. *United Kingdom* Reports 1997–II (1997) 24 EHRR 143